CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 FEBRUARY 17, 1993 NO. 7

This issue contains:

U.S. Customs Service
- T.D. 93–7 and 93–8
- General Notice

U.S. Court of Appeals for the Federal Circuit
- Appeal No. 92–1289

U.S. Court of International Trade
- Slip Op. 93–10 Through 93–14
- Abstracted Decisions:
  - Classification: C93/11 and C93/12

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 93–7)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: Friday, January 1, 1993, and Monday, January 18, 1993.

Greece drachma:	
January 4, 1993	$0.004584
January 5, 1993	.004620
January 6, 1993	.004583
January 7, 1993	.004571
January 8, 1993	.004563
January 11, 1993	.004587
January 12, 1993	.004582
January 13, 1993	.004579
January 14, 1993	.004609
January 15, 1993	.004571
January 19, 1993	.004639
January 20, 1993	.004654
January 21, 1993	.004629
January 22, 1993	.004681
January 25, 1993	.004751
January 26, 1993	.004727
January 27, 1993	.004711
January 28, 1993	.004711
January 29, 1993	.004634
South Korea won:	
January 4, 1993	$0.001266
January 5, 1993	.001264
January 6, 1993	.001260
January 7, 1993	.001259
January 8, 1993	.001258
January 11, 1993	.001257
January 12, 1993	.001258

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1993 (continued):

South Korea won (continued):

January 13, 1993	$0.001259
January 14, 1993	.001257
January 15, 1993	.001256
January 19, 1993	.001257
January 20, 1993	.001259
January 21, 1993	.001259
January 22, 1993	N/A
January 25, 1993	.001257
January 26, 1993	.001254
January 27, 1993	.001254
January 28, 1993	.001255
January 29, 1993	.001256

Taiwan N.T. dollar:

January 4, 1993	N/A
January 5, 1993	$0.039362
January 6, 1993	.039329
January 7, 1993	.039354
January 8, 1993	.039335
January 11, 1993	.039293
January 12, 1993	.039300
January 13, 1993	.039307
January 14, 1993	.039293
January 15, 1993	.039314
January 19, 1993	.039217
January 20, 1993	N/A
January 21, 1993	N/A
January 22, 1993	N/A
January 25, 1993	N/A
January 26, 1993	N/A
January 27, 1993	.039200
January 28, 1993	.039231
January 29, 1993	.039232

Dated: February 2, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93-8)

FOREIGN CURRENCIES

Variances From Quarterly Rates for January 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93-1 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holidays: Friday, January 1, 1993, and Monday, January 18, 1993.

China, P.R., reminbi yuan:	
January 13, 1993	N/A
January 15, 1993	N/A
Ireland pound:	
January 25, 1993	$1.688500
Sri Lanka rupee:	
January 8, 1993	N/A
January 14, 1993	N/A

Dated: February 2, 1993.

Michael Mitchell,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 2–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of December 1992 follow. The last notice was published in the CUSTOMS BULLETIN on January 27, 1992.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: February 3, 1993

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

01/12/93
19:04:33

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN DECEMBER 1992

PAGE 1
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9200457	19921201	20121201	CHURCH	LONG RICH LIMITED	N
COP9200458	19921201	20121201	BAKERY HOUSE	LONG RICH LIMITED	N
COP9200459	19921201	20121201	HAPPY EASTER	LONG RICH LIMITED	N
COP9200460	19921203	20121203	DULCIE	TABLETOPS UNLIMITED INC.	N
COP9200461	19921203	20121203	PETITE ROSE	UNLIMITED TABLETOPS INC.	N
COP9200462	19921203	20121203	VICTORIAN BOUQUET	TABLETOPS UNLIMITED INC.	N
COP9200463	19921203	20121203	PINK ROSE	TABLETOPS UNLIMITED INC.	N
COP9200464	19921203	20121203	PINK ROSE	TABLETOPS UNLIMITED INC.	N
COP9200465	19921203	20121203	SWF3 SNOWFLAKE PATTERN A	AMERITEX, INC.	N
COP9200466	19921207	20121207	SUPER NES SUPER 6	NINTENDO OF AMERICA INC.	N
COP9200467	19921207	20121207	NINTENDO WORLD CUP (NES VERSION)	NINTENDO OF AMERICA INC.	N
COP9200468	19921207	20121207	SUPER SOCCER	NINTENDO OF AMERICA INC.	N
COP9200469	19921207	20121207	SUPER MARIO WORLD (SNES)	NINTENDO OF AMERICA INC.	N
COP9200470	19921207	20121207	THE LEGEND OF ZELDA: A LINK TO THE PAST	NINTENDO OF AMERICA, INC.	N
COP9200471	19921207	20121207	F-ZERO (SUPER NESS)	NINTENDO OF AMERICA INC.	N
COP9200472	19921207	20121207	SIM CITY (SUPER SNES)	NINTENDO OF AMERICA INC	N
COP9200473	19921207	20121207	438 BLACK & WHITE KIDS	PRINCESS FABRICS INC.	N
COP9200474	19921207	20121207	TIGER STRIPE CAMOUFLAGE	TIGER STRIPE PRODUCTS, INC.	N
COP9200475	19921207	20121207	IBM 7568 GEARBOX MODEL 800 BASIC INPUT/OUTPUT SYSTEM BI	INTERNATIONAL BUSINESS MACHINE	N
COP9200476	19921207	20121207	ALADDIN	WALT DISNEY COMPANY	N
COP9200477	19921207	20121207	DC COMICS STYLE GUIDE	DC COMICS, INC.	N
COP9200478	19921210	20121210	BATMAN TM THE ANIMATED SERIES STYLE GUIDE	DC COMICS, INC.	N
COP9200479	19921216	20121216	SUPER TENNIS (SUPER NESS)	GAMESA S.A.	N
COP9200480	19921216	20121216	QIX (GAME BOY VERSION)	NINTENDO OF AMERICA, INC.	N
COP9200481	19921216	20121216	SET OF WILD NUMBER BINGO CARDS	TRADE PRODUCTS INCORPORATED	N
COP9200482	19921216	20121216	MICROSOFT MS-DOS VERSION 5.00 UPGRADE	MICROSOFT CORPORATION	N
COP9200483	19921221	20121221	MURRAY'S IRON WORKS SERIES VI DESIGN	MURRAY'S IRON WORK	N
COP9200484	19921221	20121221	MURRAY'S IRON WORKS SERIES IV DESIGN	MURRAY'S IRON WORK	N
COP9200485	19921222	20121222	LISA FRANK 1990 HALLOWEEN RING COLLECTION	LISA FRANK, INC.	N
COP9200486	19921222	20121222	LISA FRANK BIG HALLOWEEN ERASERS - 1991	LISA FRANK, INC.	N
COP9200487	19921222	20121222	712 COLOR ME EASTER STICKERS	LISA FRANK, INC.	N
COP9200488	19921222	20121222	1991 LISA FRANK STAMPS COLLECTION	LISA FRANK, INC.	N
COP9200489	19921222	20121222	486 HALLOWEEN PENCILS 1989	LISA FRANK, INC.	N
COP9200490	19921222	20121222	LISA FRANK COLOR YOUR OWN STICKERS 1990	LISA FRANK, INC.	N
COP9200491	19921222	20121222	ACTION FIGURE	LARAMI CORPORATION	N
COP9200492	19921204	20121204	ACT RAISER (ENGLISH LANGUAGE VERSION)	ENIX CORPORATION	N
COP9200493	19921216	20121216	MICROSOFT MS-DOS VERSION 5.00	MISCROSOFT CORPORATION	N
COP9200494	19921230	20121230	EMBROIDERED SEQUINS PATTERNS	SEQUINS INTERNATIONAL, INC.	N

SUBTOTAL RECORDATION TYPE 38

01/12/93
19:04:33

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN DECEMBER 1992

PAGE 2
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9200649	19921203	20000102	L.G.B. NAMEPLATE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9200650	19921203	20121203	LGB AND LOCOMOTIVE DESIGN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9200651	19921203	20000626	LAKE GEORGE & BOULDER L.G.B. AND DESIGN	ERNST PAUL LEHMANN PATENTWERK	N
TMK9200652	19921203	20010313	FORSTER STYLIZED	FORSTER MFG. CO., INC.	Y
TMK9200653	19921203	20070818	LEHMANN	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9200654	19921203	20010806	LGB	ERNST PAUL LEHMANN, PATENTWERK	N
TMK9200655	19921203	20081122	FORSTER	FORSTER MFG. CO., INC.	Y
TMK9200656	19921203	20001211	BMW	BAYERISCHE MOTOREN WERKE AKTIENG	N
TMK9200657	19921203	19940616	SUPPORT CAN BE BEAUTIFUL	PLAYTEX APPAREL, INC.	N
TMK9200658	19921203	20010929	THANK GOODNESS IT FITS	PLAYTEX APPAREL, INC.	N
TMK9200659	19921203	19960113	SUPER LOOK	PLAYTEX APPAREL	N
TMK9200660	19921203	20000331	18 HOUR	PLAYTEX APPAREL, INC.	N
TMK9200661	19921204	20020901	NUVISTA	TRUEVISION, INC.	N
TMK9200662	19921204	20020929	MADAME ALEXANDER WITH DESIGN	ALEXANDER DOLLS COMPANY	N
TMK9200663	19921204	20121204	ACT RAISER (ENGLISH LANGUAGE VERSION)	ENIX CORPORATION	N
TMK9200664	19921204	20080712	S.R.O. STYLIZED LETTERING	AMASIA INTERNATIONAL LTD	N
TMK9200665	19921204	20030920	S.R.O. WITH DESIGN	AMASIA INTERNATIONAL LTD.	N
TMK9200666	19921207	20051112	S.R.O.	AMASIA INTERNATIONAL LTD.	N
TMK9200667	19921207	20080625	S.R.O.	AMAISA INTERNATIONAL LTD.	N
TMK9200668	19921207	19931120	MAGGIE JONES	AMASIA INTERNATIONAL LTD.	N
TMK9200669	19921207	19940709	S.R.O. D'MIGUEL WITHIN A CIRCLE	AMASIA INTERNATIONAL LTD.	N
TMK9200670	19921207	20050416	1.5	DRL ENTERPRISE	N
TMK9200672	19921207	20050416	1.5	DRL ENTERPRISE	N
TMK9200673	19921207	20080315	1.0	DRL ENTERPRISES	Y
TMK9200674	19921207	20050402	1.25	DRL ENTERPRISES INC.	Y
TMK9200675	19921216	20020714	HYPERCOLOR	GENERRA SPORTSWEAR COMPANY	N
TMK9200676	19921216	20070526	MICHAEL JACKSON	TRIUMPH INTERNATIONAL, INC.	N
TMK9200677	19921216	20070616	MICHAEL JACKSON	TRIUMPH INTERNATIONAL, INC.	N
TMK9200678	19921216	20070526	MICHAEL JACKSON	TRIUMPH INTERNATIONAL, INC.	N
TMK9200679	19921216	20010213	CHRISTAIN DIOR	CHRISTAIN DIOR	N
TMK9200680	19921216	20010609	GAMESA	GAMESA S.A.	N
TMK9200681	19921216	20061223	TRUCK-LITE (STYLIZED LETTERING)	TRUCK-LITE CO., INC.	N
TMK9200682	19921216	20020519	ULTRAFLASH (STYLIZED LETTERING)	TRUCK-LITE CO., INC.	N
TMK9200683	19921216	20020725	MARLBORO LABEL	PHILIP MORRIS INCORPORATED	N
TMK9200684	19921221	20020811	VIDI/O BOX	TRUEVISION, INC.	N
TMK9200685	19921221	20020908	BALLCAP BUDDY	HAROLD W. FINNEY, JR	N
TMK9200686	19921221	19970125	AQUA DI SELVA	DERRIA AKTIENGESELLSCHAFT	N
TMK9200687	19921216	20121216	MICHAEL JACKSON	TRIUMPH INTERNATIONAL, INC.	N
TMK9200688	19921222	20010901	ORAJEL	DEL PHARMACEUTICAL, INC.	N
TMK9200689	19921222	20050625	COLUMBIA	COLUMBIA SPORTSWEAR COMPANY	N
TMK9200690	19921222	20001230	MISCELLANEOUS DESIGN	COLUMBIA SPORTSWEAR COMPANY	N
TMK9200691	19921223	20060927	BELL	BELL SORTS, INC.	N

SUBTOTAL RECORDATION TYPE 42

TOTAL RECORDATIONS ADDED THIS MONTH 80

U.S. Court of Appeals for the Federal Circuit

MINEBEA CO., LTD. AND NMB CORP., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND TORRINGTON CO., DEFENDANT-APPELLEE

Appeal No. 92–1289

(Decided January 26, 1993)

Michael J. Brown, Tanaka, Ritger & Middleton, of Washington, D.C., argued for plaintiffs-Appellants. With him on the brief were *H. William Tanaka* and *Michele N. Tanaka.*

A. David Lafer, Senior Trial Counsel, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With him on the brief were *Stuart M. Gerson,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, *Berniece A. Browne,* Senior Counsel for Antidumping Litigation and *Robert J. Heilferty,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce. *James R. Cannon, Jr.,* Stewart & Stewart, of Washington, D.C., argued for defendant-appellee, The Torrington Company. *Eugene L. Stewart, Terence P. Stewart* and *David Scott Nance,* Stewart & Stewart, of Washington, D.C., were on the brief for defendant-appellee, The Torrington Company.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, MICHEL, and LOURIE, *Circuit Judges.*

LOURIE, *Circuit Judge.*

Minebea Co., Ltd. and NMB Corporation (collectively Minebea) appeal from the judgment of the United States Court of International Trade upholding an antidumping duty order covering, *inter alia,* spherical plain bearings from Japan. Specifically, Minebea challenges the trial court's decision to sustain the determination of the Department of Commerce, International Trade Administration (ITA), that The Torrington Company had standing to file an antidumping duty petition on behalf of the domestic manufacturers of spherical plain bearings. *Minebea Co. v. United States,* Court No. 89–06–00344 (Ct. Int'l Trade January 29, 1992). Because the determination of the ITA was supported by substantial evidence on the record and was otherwise in accordance with law, we affirm.

BACKGROUND

On March 31, 1988, Torrington filed a petition with the ITA requesting that the ITA investigate whether to impose antidumping duties on antifriction bearings, including spherical plain bearings produced and

imported by Minebea from Japan. Pursuant to 19 U.S.C. § 1673a(b)(1) (1988), Torrington alleged that it was an interested party and that it was filing the petition on behalf of the domestic antifriction bearing industry. The ITA initiated an antidumping investigation on the basis of Torrington's petition.

During the course of the investigation, the ITA received a number of submissions from parties challenging Torrington's standing to file its petition on the ground that it did not file "on behalf of" the domestic industry as required by 19 U.S.C. § 1673a(b)(1). New Hampshire Ball Bearings (NHBB), a U.S. subsidiary of Minebea, was one of the domestic manufacturers of spherical plain bearings that challenged Torrington's standing.

The ITA adhered to its policy of presuming standing unless a majority of the domestic industry affirmatively opposed the petition. *See* Antifriction Bearings from Japan, 53 Fed. Reg. 45,344 (Dep't Comm. 1988) (Preliminary Determination). In order to evaluate whether the opposition constituted a majority of the domestic industry, the ITA issued questionnaires to the parties challenging Torrington's standing. The questionnaires requested, among other things, that each party provide an estimate of its "percentage share of the U.S. market as it relates to the domestic production of antifriction bearings" and an estimate of its "percentage share of the U.S. market as it relates to the sale of antifriction bearings" for the various classes and kinds of bearings subject to the antidumping investigation.

Of the opposing parties responding to the questionnaires, NHBB was the only one to provide any information regarding spherical plain bearing production. NHBB reported its total domestic production of spherical plain bearings; it did not provide an estimate of the total U.S. production of spherical plain bearings or its percentage of such production. The information provided by NHBB was not deemed sufficient by the ITA to establish that a majority of the domestic industry opposed the petition. *See* Antifriction Bearings from Japan, 54 Fed. Reg. 19005 (Dep't Comm. 1989) (Final Determination).

The ITA subsequently published its antidumping duty order covering, *inter alia,* spherical plain bearings from Japan. 54 Fed. Reg. 20904 (1989). Minebea appealed to the Court of International Trade challenging the ITA's determination that Torrington's antidumping duty petition was filed "on behalf of" the domestic spherical plain bearings industry. That court affirmed.

On appeal to this court, Minebea requests that the decision of the Court of International Trade be reversed and the antidumping duty order vacated on the ground that the ITA's standing determination was not supported by substantial evidence.

Discussion

We review decisions of the Court of International Trade by applying a statutory standard of review to the underlying ITA determination. *See Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1559 n.10, 2 Fed.

Cir. (T) 130, 133 n.10 (Fed. Cir. 1984). We must determine whether that court correctly concluded that the ITA's standing determination was supported by substantial evidence on the record and was otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988); *U.H.F.C. Co. v. United States,* 916 F.2d 689, 696 (Fed. Cir. 1990).

This court has previously recognized that the ITA has considerable discretion in determining whether to initiate or maintain an antidumping investigation. In *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660 (Fed. Cir. 1992), we held that the ITA had broad discretion to decide whether to initiate an investigation based on a petition filed on behalf of an industry without necessarily determining that it was affirmatively supported by a majority of the domestic industry. In *Suramerica,* we concluded that the ITA's policy of presuming standing unless a majority of the domestic industry actively opposes the petition falls within the range of permissible construction of the statutory phrase "on behalf of." *Id.* at 667 (following *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837 (1984)).

Furthermore, in *Trent Tube Division, Crucible Materials Corp. v. Avesta Sandvik Tube AB,* 975 F.2d 807 (Fed. Cir. 1992), we held that the decision of the ITA and the U.S. International Trade Commission (ITC) to pursue an antidumping investigation to its conclusion was not dependent on continuing determinations that a majority of the domestic industry was or continued to be in support of the petition. The ITC argued that, under the ITA's construction of the statute, the requirement that a petition be filed on behalf of the domestic industry is "not a continuing jurisdictional prerequisite * * * but rather is merely a preliminary question left to [the ITA's] discretion." *Id.* at 812. The court in *Trent Tube* concluded that the ITA's construction was well within the range of permissible readings of the statute.

Minebea argues that *Oregon Steel Mills Inc. v. United States,* 862 F.2d 1541, 7 Fed. Cir. (T) 22 (Fed. Cir. 1988), stands for the proposition that when there is a lack of industry support for an antidumping duty petition, the petitioner lacks standing. We disagree. As we stated in *Suramerica,* "[a]t most, *Oregon Steel* stands for the proposition that without a certain minimal level of support, [the ITA] may, but need not, revoke a duty order." 966 F.2d at 666. In *Oregon Steel,* we noted that it was not necessary to determine precisely what minimal level of support was required to sustain an antidumping duty order because in that case "[t]he lack of industry support * * * is overwhelming. Moreover, the industry is not simply indifferent, but has expressed a positive desire to eliminate the antidumping order * * *." 862 F.2d at 1545 n.4, 7 Fed. Cir. (T) at 28 n.4. In the instant case, NHBB has not shown that there was an overwhelming lack of industry support for the petition or that the industry affirmatively opposed it. Indeed, NHBB was the only U.S. producer of spherical plain bearings to submit data in support of its opposition to the petition and in doing so failed to establish that a majority of the domestic industry opposed the petition.

We do not accept Minebea's argument that there was no evidence to support the ITA's determination in favor of Torrington's standing. In its effort to develop the administrative record, the ITA specifically requested market and production information relating to spherical plain bearings from the petition opponents. The fact that NHBB was the only opponent to respond to the request and that it did so with data that was inadequate was itself evidence that was substantial. The ITA concluded that NHBB failed to discharge its burden to show that a majority of the domestic industry opposed Torrington's petition with respect to spherical plain bearings. That conclusion was supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933, 3 Fed. Cir. (T) 44, 51 (Fed. Cir. 1984) (citation omitted). The ITA's conclusion was a reasonable implementation of the broad discretion, recognized in *Suramerica* and *Trent Tube,* accorded to the ITA as an agency charged with administering the antidumping statutes. We will not substitute our own judgment when the ITA has exercised its discretion in a reasonable manner. *See Chevron,* 467 U.S. at 844. Accordingly, we hold that the ITA did not exceed its statutory authority in deciding in favor of Torrington's standing.

In the alternative, Minebea requests that we remand this case to the ITA and order the agency to reconsider its standing determination in view of information compiled by the ITC during the injury phase of the investigation. We reject that argument because nothing in the antidumping laws requires the ITA to consider data assembled by the ITC. Under the statutory scheme, the ITA is alone charged with the responsibility of determining whether an interested party has standing to file an antidumping duty petition, 19 U.S.C. § 1673a(b)(1) (1988), and whether to commence an investigation on the basis of that petition. 19 U.S.C. § 1673a(c) (1988). Once that determination is made, the ITC is then responsible for making a preliminary determination "whether there is a reasonable indication" that a domestic industry is being materially injured. 19 U.S.C. § 1673b(a) (1988). As we stated in *Suramerica* regarding the respective roles of the ITA and the ITC in determining whether standing exists to file an antidumping duty petition:

> [a]lthough both [the ITA] and the ITC are 'charged' with administering different parts of the Act, it is [the ITA] who determines that a petition is sufficient to cause the initiation of investigations—that the statutory requirements are satisfied. The ITC's position in its brief is that it defers to [the ITA's] initial determination, and that only [the ITA] can review that determination. This is a reasonable and permissible interpretation of the Act's delineation of respective responsibilities.

966 F.2d at 665 n.6. Thus, the ITA, as the agency responsible for assessing standing under the antidumping laws, may determine what information it should use in order to carry out its statutory duty.

Even if the ITA might have reached a different determination had it considered the ITC data, that does not invalidate its standing determination if it is supported by substantial evidence on the record, as it is here. The possibility of drawing different and inconsistent conclusions from the evidence does not prevent the ITA's determination from being supported by substantial evidence. The only question here is whether there is evidence which could reasonably lead to the determination reached by the ITA. *PPG Indus., Inc. v. United States,* 978 F.2d 1232, 1237 (Fed. Cir. 1992). We conclude that there is.

CONCLUSION

The ITA's determination that Torrington had standing to file an antidumping petition involving spherical plain bearings was supported by substantial evidence and was otherwise in accordance with law. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–10)

SPRADLING INTERNATIONAL, INC., A/K/A C.G. SPRADLING & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–06–00264

Plaintiff challenges Customs' reclassification of merchandise under item 355.85, TSUS, and contends the previous classification under item 355.81 is proper. Plaintiff moves for summary judgment. Defendant cross-moves for summary judgment.

Held: Plaintiff's motion for summary judgment granted.

[Judgment for plaintiff.]

(Decided January 26, 1993)

Willkie Farr & Gallagher (*Christopher Dunn, Vincent Bowen*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Barbara M. Epstein*), *Jack Diamond,* General Attorney, United States Customs Service, International Trade Litigation, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Plaintiff, Spradling International, Inc., challenges the United States Customs Service's reclassification of merchandise, resulting in the change of duties from zero to 5.3 percent. Plaintiff and defendant both move for summary judgment pursuant to Rule 56 of the rules of this court. The court has jurisdiction under 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Plaintiff imported from Colombia merchandise consisting of knitted man-made fibers laminated with sheets of plastic made from polyvinyl chloride. It is designed to be used as coverings in various applications, including interior automotive linings and upholstery, marine use, furniture upholstery, and imitation leather handbags and luggage.

The merchandise was first liquidated in October 1988 under item 355.81, Tariff Schedules of the United States (TSUS), free of duty under the Generalized System of Preferences. Subsequently, Customs reclassified the merchandise under item 355.85, TSUS, at a duty rate of 5.3 percent. The reclassification stems from an internal Customs decision that such action was required by the decision of *Elbe Products Corp. v. United States,* 6 Fed. Cir. (T) 133, 846 F.2d 743 (1988) (*Elbe II*). Prior to

the internal decision, merchandise identical in all material respects to the merchandise in issue was classified according to Customs Ruling 072650 (September 16, 1983) under items 355.81 and 355.82, depending on whether the plastic component constituted more than 70 of the weight of the entire article.

There is no issue of material facts in this action. The dispute is over whether the merchandise should be properly classified under item 355.81, TSUS, as of man-made fibers over 70% by weight of plastic, or item 355.85, TSUS, as other textile fabrics laminated with plastics not specifically provided for. The court rules that the proper classification of the merchandise is item 355.81.

Discussion

The primary issue presented to the court is whether non-textile components should be disregarded in determining the chief value of the merchandise classifiable under item 355.81. The pertinent provisions of the TSUS are as follows:

SCHEDULE 3 – TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 4.

Subpart C headnotes:

2. For the purposes of the tariff schedules –

* * * * * * *

(c) the provisions in this subpart for fabrics, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics (items 355.65–.85), cover products weighing not over 44 ounces per square yard without regard to the relative quantities or value of the textile fibers and the rubber or plastics material, but do not cover products weighing over 44 ounces per square yard unless they contain more than 50 percent by weight of textile fibers.

* * * * * * *

Woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics:

355.65	Of vegetable fibers Of cotton Of vegetable fibers, except cotton
355.70	Of wool
355.75	Of silk Of man-made fibers:
355.81	Over 70 percent by weight of rubber or plastics
35.82	Other Of strips Other
355.85	Other

Pursuant to the General Headnotes and Rules of Interpretation of the TSUS, the term "of," as used between the description of an article and a material, means "the article is wholly or in chief value of the named material." General Headnote 9(i). And "an article is in chief value of a material if such material exceeds in value each other single component material of the article." General Headnote 10(f).

The merchandise in question consists of knit polyester laminated with sheets of plastic. The plastic component accounts for more than 50% of the value, and more than 70% of the weight, of the entire article. Thus, there is no question that the merchandise is in chief value of plastic.

The question is whether the product in chief value of plastic is classifiable under item 355.81. Prior to the decision of *Elbe II,* defendant was in agreement with plaintiff that the non-textile component should be disregarded in determining the chief value component under item 355.81; as a result the merchandise at issue was classified under item 355.81. Defendant contends, however, that *Elbe II* has overruled its previous position and mandates application of the chief value test to the whole article without disregarding any component thereof; accordingly, the merchandise at issue is properly classified under item 355.85.

I. Whether *Elbe II* is applicable:

The merchandise involved in *Elbe II,* Viledon heel grips, consists of non-woven man-made fibers and rubber, with rubber as the component of chief value. Customs classified the merchandise under item 355.25 as non-woven fabrics "of man-made fibers." In making such determination, Customs disregarded the rubber portion relying on Headnote 4(b) to Schedule 3, which provides: "In determining the component fibers of chief value in coated or filled, or laminated, fabrics and articles wholly or in part thereof, the coating or filling, or the nontextile laminating substances, shall be disregarded in the absence of context to the contrary." The *Elbe II* court disagreed and stated that Headnote 4(b) applies only "where it is necessary to decide whether vegetable fiber, wool, silk, or man-made fiber is the fiber in chief value" and "the headnote is no indication that [the coating, filling or laminating substance] should be disregarded for other purposes." 6 Fed. Cir. (T) at 135, 846 F.2d at 745 (quoting *United States v. Elbe Products Corp.,* 68 CCPA 72, 77, C.A.D. 1267, 655 F.2d 1107, 1111 (1981) (*Elbe I*)). The *Elbe II* court held that, since the merchandise thereof contained only one class of fiber, Headnote 4(b) was not applicable and that the merchandise should be classified under item 359. 60 as "other" textile fabrics not specially provided for.

Defendant contends that the principle of the *Elbe II* decision is applicable to the present case because the merchandise at issue is similar to that in *Elbe II* except that one contains woven fabric and the other nonwoven fabric. Defendant further contends that while Customs in the past had resisted following a number of court decisions that applied the chief value test to the whole article of similar products, *Elbe II* is the first

case where the two competing items were both under Schedule 3 and the court mandated application of the chief value test to the whole article. In the previous cases the competing items were between Schedule 3 (textile products) and Schedule 7 (rubber and plastics). *See Elbe I; Canadian Vinyl Indus., Inc. v. United States,* 76 Cust. Ct. 1, C.D. 4626, 408 F. Supp. 1377 (1976), *aff'd on other grounds,* 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977); *Briarcliff Clothes, Ltd. v. United States,* 66 Cust. Ct. 228, C.D. 4194 (1971).

Plaintiff argues that *Elbe II* is not applicable to the instant case because *Elbe II* does not concern the same TSUS items and headnote as the instant case. Items 355.81 and 355.85, and their controlling Headnote 2(c) of Part 4, Subpart C, of Schedule 3, have distinct provisions and legislative history, and are not at all discussed in *Elbe II.* Moreover, the decision of *Elbe II* is based on court's construction of Headnote 4(b) to Schedule 3, which has no application to this case since the merchandise at issue contains only one class of fiber (man-made fiber).

The court finds plaintiff's argument convincing. Based on the following analysis, the court holds that *Elbe II* is not applicable to the instant case.

II. Item 355.81 versus Item 355.85:

1. *Statutory Provisions:*

Items 355.81 and 355.85 both cover woven or knit fabrics of textile materials, coated, filled or laminated with rubber or plastics. Item 355.81 provides for such products "of man-made fibers over 70 percent by weight of rubber or plastics," whereas item 355.85 covers "other" of such products, not specially provided for as of vegetable fibers, silk, wool or man-made fibers under items 355.65–.82.

Items 355.81 and 355.85 are both governed by Headnote 2(c) of Part 4, Subpart C, of Schedule 3, which provides: "[items 355.65–.85] cover products weighing not over 44 ounces per square yard without regard to the relative quantities or value of the textile fibers and the rubber or plastics material * * *." Plaintiff and defendant, however, disagree as to what this provision of Headnote 2(c) means.

According to plaintiff, the phrase "without regard to the relative quantities or value of the textile fibers and the rubber or plastics material" clearly indicates that, in determining whether a product is in chief value "of" vegetable fibers, silk, wool, man-made fibers or other materials under items 355.65–.85, the rubber and plastic components are to be disregarded. Plaintiff further contends that this interpretation is consistent with the description of item 355.81 providing for products "of man-made fibers over 70% by weight of rubber or plastics," since most of the products with such weight qualification are in chief value of rubber or plastics. If the chief value test were to be applied to the entire article without disregarding the rubber or plastic components, the coverage of item 355.81 would be limited to expensive fabrics covered by heavy and inexpensive plastic or rubber, a rather uncommon combination.

Defendant contends that the purpose of Headnote 2(c) is to provide a special weight specification and the phrase "without regard to the relative quantities or value * * *" does not direct how the chief value test should be applied to the items controlled thereunder. Furthermore, defendant argues, classification of the merchandise under item 355.85 is consistent with Headnote 2(c), since item 355.85 is itself under Headnote 2(c), covering products in chief value of materials not specially provided for by items 355.65–.82, and plastic is one of such "other" materials.

Thus, the provision of Headnote 2(c) is apparently susceptible of varying interpretation. It is unclear from the language of Headnote 2(c) whether Congress intended the product in chief value of rubber or plastics to be classifiable under items 355.65–.85 inclusive, as product "of" specific fibers as well as of other material not specially provided for, or exclusively under item 355.85, as product of "other" material only.

2. *Legislative History:*

Where resolution of a question of federal law turns on a statute and intention of Congress, courts look first to statutory language and then to legislative history if statutory language is unclear. *Blum v. Stenson,* 465 U.S. 886, 896 (1984).

(1) The 1965 Act:

Item 355.81 (along with item 355.82) and Headnote 2(c) were enacted by Section 15(c) of the Tariff Schedule Technical Amendments Act of 1965, Pub. L. 89–241, 79 Stat. 933, 936. In explaining the treatment of products covered by items 355.65–.85 under the then existing tariff schedules, the House Ways & Means Committee report on the 1965 Act stated that "regardless of whether the textile fabric or the rubber or plastics is the component of chief value, the fabric is provided for in items 355.65–355.85." H.R. Rep. No. 342, 89th Cong., 1st Sess. 11 (1965). Here, the House Report refers to items 355.65–.85 inclusively, not just item 355.85.

Most convincingly, the House Report stated the following in connection with the enactment of item 355.81:

> For several years prior to the effective date of the new schedules, *certain rayon fabrics, covered with and in chief value of rubber or plastics,* were held to be similitude, at the rate applicable to manufactures of rubber, not specifically provided for, in paragraph 1537 (b). *Item 355.81 would continue for these fabrics* the rate of 12.5 percent ad valorem which had applied thereto under the old tariff schedules. However, a weight distinction would be substituted for the old chief value concept.

Id. at 12 (emphasis added).

This passage clearly indicates that Congress specifically intended item 355.81 to cover those products of man-made fabrics in chief value of rubber or plastics which were previously provided for under paragraph 1537(b) of the old tariff schedules effective prior to the TSUS. Para-

graph 1537(b) covered manufactures of india rubber or gutta-percha, or of which any of these substances is the component material of chief value, not specially provided for. 19 U.S.C. § 1001, par. 1537(b) (1958), *repealed by* Tariff Classification Act of 1962, Pub. L. 87–456, Title I, § 101, 76 Stat. 72 (1962). Since all products provided for by paragraph 1537(b) were composed of wholly or in chief value of rubber or materials in similitude, the only logical conclusion from the above passage is that Congress intended certain of such products to be covered by item 355.81, TSUS.

(2) The 1984 Amendment:

Also relevant is the legislative history of Section 111 of the Trade and Tariff Act of 1984, Pub. L. 98–573, 98 Stat. 2948, 2952, which amended Headnote 2(c) by adding the words "or value" after the phrase "without regard to the relative quantities." The amendment was prompted by court decisions in *United States v. Canadian Vinyl Indus., Inc.*, 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977), and *Elbe I,* 68 CCPA 72, 655 F.2d 1107, both of which held that products made of textile fabrics coated or laminated with rubber or plastics and in chief value of rubber or plastics should be classified under Schedule 7, instead of Schedule 3 as Customs originally determined. The Senate Report on the 1984 Act indicated that the purpose of the amendment is "to reverse the court's decisions and to restore the proper classification of these fabrics to that understood by the Customs Service and Congress prior to the decisions." S. Rep. No. 308, 98th Cong., 2d Sess. 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. 4910, 4915.

Defendant contends the 1984 amendment has no bearing on the present case because it was intended to clarify classification of certain products between Schedule 3 and Schedule 7, and hence does not instruct as to under which item within Schedule 3 such products in chief value of rubber or plastic should be classified.

The court, however, finds the legislative history of the 1984 amendment significant because one of the decisions reversed by Congress, *Canadian Vinyl* involves interpretation of item 355.82, the twin provision of item 355.81, which was enacted by the 1965 Act to cover the same products as item 355.81 except for the percentage weight of rubber or plastics thereof. In *Canadian Vinyl,* Customs classified merchandise composed of plastic and nylon fabric, in chief value of plastic, under item 355.82. In supporting its position, Customs relied on Headnote 2(c) and related legislative history of the 1965 Act. *See Canadian Vinyl,* 64 CCPA at 102, 555 F.2d at 809. The Customs Court ruled against Customs' position on the chief value test, *Canadian Vinyl,* 76 Cust. Ct. 1, 408 F. Supp. 1377; the decision was affirmed by the Court of Customs and Patent Appeals, albeit on a different ground. *See* 64 CCPA at 106, 555 F.2d at 812.

It seems particularly significant that Congress, in discussing its intention to reverse these court decisions, did not question Customs' specific classification in these cases; rather, it clearly stated that the purpose of the amendment was to restore the proper classification un-

derstood by Customs. Furthermore, Congress reacted to the court decisions by inserting the words "or value" after the phrase "without regard to relative quantities" in Headnote 2(c), which controls items 355.65–355.85 inclusively. If Congress had intended to limit the effect of this amendment to item 355.85 exclusively, it is difficult to see why it could not have specified such limitation in the amendment.

3. *Judicial Construction:*

There has been no case addressing item 355.81 directly. Nonetheless, in *Marshall Co. v. United States,* 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971), where merchandise composed of rayon fabric laminated with rubber was held not classifiable under items 355.65–.85 because it did not meet the weight specification under Headnote 2(c), the court consulted the legislative history of the 1965 Act, House Report No. 342, *supra,* and stated in particular that merchandise covered by items 355.65–.85 was so covered "regardless of whether the textile fabric or the rubber or plastic component was of chief value * * *." *Id.* at 325, 334 F. Supp. at 650. By referring to items 355.65–.85 inclusive, the court's interpretation appears to be consistent with the legislative history discussed above.

Defendant cites *Briarcliff Clothes, Ltd. v. United States,* 66 Cust. Ct. 228, C.D. 4194 (1971) in supporting its position that, among items 355.65–.85, product in chief value of plastic or rubber is classifiable only under item 355.85. In *Briarcliff,* where wearing apparel in chief value of rubber was held classifiable as textile material under Schedule 3 instead of as wearing apparel of rubber under Schedule 7, the court stated: "a woven or knit fabric of textile materials laminated with rubber and in chief value of rubber is provided for under item 355.85 * * *." *Id.* at 232. The *Briarcliff* court's construction of item 355.85, however, is not controlling in the present case because in *Briarcliff* the court applied the statute in effect prior to the 1965 Act, thereby leaving open the construction of the statute after the enactment of item 355.81 and Headnote 2(c), the very provisions at the center of dispute in this case.

Conclusion

In view of the unambiguous legislative history of TSUS item 355.81 and its controlling Headnote 2(c) of Part 4, Subpart C, of Schedule 3, the court concludes that it is the congressional intent that non-textile component be disregarded in determining the chief value of merchandise classifiable under item 355.81. Having reached this conclusion, the court holds that since *Elbe II* does not concern or discuss item 355.81 and its controlling Headnote 2(c), the decision of *Elbe II* is not applicable in the present case. Accordingly, the court finds the subject merchandise properly classifiable under item 355.81.

Since the court has decided the primary issue of the case in favor of plaintiff, there is no need to address any additional issues raised by plaintiff.

(Slip Op. 93–11)

SMITH CORONA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORP., AND BROTHER INDUSTRIES (USA), INC., DEFENDANT-INTERVENORS

Court No. 91–11–00827

[ITA determination sustained.]

(Dated January 27, 1993)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Julie B. Chasen,* and *Robert A. Weaver*) for plaintiff.

Stuart Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Marc E. Montalbine*), *Jeffery C. Lowe,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Hogan & Hartson (*Lewis E. Leibowitz* and *Steven J. Routh*); *Tanaka & O'Leary* (*H. William Tanaka* and *Patrick F. O'Leary*) for defendant-intervenors.

OPINION

RESTANI, *Judge:* In *Portable Electric Typewriters from Japan,* 56 Fed. Reg. 58,031 (Dep't Comm. 1991), the International Trade Administration of the Department of Commerce ("ITA") found that Brother Industries, Ltd. and Brother Industries (USA), Inc. were not circumventing the antidumping duty order on portable electric typewriters ("PETs") from Japan. Plaintiff, Smith Corona Corporation, challenges the determination.

This case involves a dispute over interpretation of the anticircumvention statute, 19 U.S.C. § 1677j (1988) Smith Corona claims that ITA erred because it: (1) ignored certain statutory factors, (2) excluded third country parts from Japan value; and (3) rejected its argument concerning transfer of the assembly line from Japan to the United States. ITA's determination will be upheld if based on substantial evidence and in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

1. *Statutory Factors:*

The anticircumvention statute provides, in part:

§ 1677j. Prevention of circumvention of antidumping an countervailing duty orders

(a) Merchandise complete or assembled in United States

(1) In general

If—

(A) merchandise sold in the United States is of the same class or kind as any other merchandise that is the subject of—

(i) an antidumping duty order issued under section 1673e of this title, * * *

(B) such merchandise sold in the United States is completed or assembled in the United States from parts or components produced

in the foreign country with respect to which such order or finding applies, and

(C) the difference between the value of such merchandise sold in the United States and the value of the imported parts and components referred to in subparagraph (B) is small,

the administering authority, after taking into account any advice provided by the Commission under subsection (e) of this section, may include within the scope of such order or finding the imported parts or components referred to in subparagraph (B) that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect.

(2) Factors to Consider:

In determining whether to include parts or components in an] * * * antidumping duty order * * *, the administering authority shall take into account such factors as—

(A) the pattern of trade,

(B) whether the manufacturer or exporter of the parts of components is related to the person who assembles or completes the merchandise sold in the United States from the parts or components produced in the foreign country with respect to which the order * * * applies, and

(C) whether imports into the United States of the parts or components produced in such foreign country have increased after the issuance of such order or finding.

19 U.S.C. § 1677j(a). Smith Corona argues that § 1677j(a)(1) is a "general clause," and § 1677j(a)(2) provides factors ITA must consider to determine whether the general clause should apply. ITA disagreed with this interpretation. It found that it was required to determine as a threshold matter under § 1677j(a)(1) whether the difference in value between completed PETs and parts imported from Japan was small. 56 Fed. Reg. at 58,033. If the difference in value was small, ITA found that it had *discretion* to include the parts and components within the antidumping duty order, taking into account the factors set forth in § 1677j(a)(2). 56 Fed. Reg. at 58,033–34.

ITA's interpretation comports with the plain meaning of the statute. Section 1677j(a)(1) states that ITA "may" include parts and components in the antidumping duty order, if the criteria under that section are met. Section 1677j(a)(2) provides the factors that ITA must consider to determine "whether" to include parts and components within the order. The interpretation that Smith Corona urges on the court is unfounded. Furthermore, its arguments based on congressional intent are meritless and, in any event, irrelevant in light of the express statutory language.

2. *Third Country Parts and Japan Value:*

Smith Corona claims ITA erred because it failed to investigate and verify the extent to which parts from third countries contained Japanese value, and it improperly placed the burden of proof on Smith Corona to submit evidence of the Japanese value in third country parts.

ITA excluded third country parts from its analysis on the following grounds:

> We find no legal basis for including third country parts in our calculation of the difference between the value of Japanese parts and components and the end-product * * *. Even assuming that such a legal basis exists, Smith Corona has not provided sufficient evidence that indicates that Brother provided manufacturing assistance other than direct Japanese investment in a related subsidiary. Direct Japanese investment alone is not a sufficient basis to treat parts manufactured in a third country as Japanese parts.
>
> There is no evidence that PET parts exported by Brother from its related subsidiary in Malaysia are in fact products from Japan, *i.e.*, that they are merely transshipped * * *.
>
> In addition, * * * parts and components which are imported from unrelated suppliers in third countries, and which are of third country origin cannot be viewed as being part of the Japan value of the finished product. As these parts are further manufactured in third countries, they cannot be viewed as produced in a country with respect to which the antidumping duty order applies * * *.

56 Fed. Reg. at 58,036.

Smith Corona contends that third country parts are designed and engineered in Japan, and contain Japanese subparts and components; therefore, their Japanese content should be considered in the value comparison set forth in § 1677j(a)(1). This is not what is required by statute. The statute provides that, when assembly is transferred to the United States, the value of the merchandise sold in the United States shall be compared with "parts or components *produced in the foreign country with respect to which * * * [the antidumping] order * * * applies.*" 19 U.S.C. § 1677j(a)(1)(B) (emphasis added). The question then is to determine where the parts are produced.

It is apparent from ITA's determination that it considers merchandise to be "produced" in the country exporting to the United States if final manufacture occurs there. In the absence of simple transshipment, some production would occur in the exporting country. *See Television from Japan,* 46 Fed. Reg. 30,167, 30,167 (Dep't Comm. 1981) (results of examination of possible transshipments) (televisions exported from third countries not subject to dumping finding on Japanese televisions, absent evidence of transshipment).[1] ITA has found that transshipment occurs when factors such as the following are present: (1) the subject merchandise does not enter the commerce of the third country; (2) the

[1] In *Television from Japan*, 46 Fed. Reg. 30,167, ITA identified six key components in a television. It found that each component represented significant value, or its inclusion substantially transformed the unit. It found transshipment did not occur as long as any one of the six key components was not of Japanese origin.

subject merchandise is not physically integrated with any other component and no value is added in the third country; and (3) the subject country's manufacturer is related to the third country assembler and the U.S. importer, and knows at the time of exportation that the merchandise will be exported to the United States. *See Color Picture Tubes from Japan,* 52 Fed. Reg. 44, 171, 44,172 (Dep't Comm. 1987) (final determ. of sales at less than fair value). In determining if merchandise exported from an intermediate country is nonetheless covered by an antidumping order, ITA has also considered whether the essential component is substantially transformed in the country of exportation.[2] *Erasable Programmable Read Only Memories (EPROMs) from Japan,* 51 Fed. Reg. 39,680, 39,692 (Dep't Comm. 1986) (final determ. of sales at less than fair value) (computer parts exported through intermediate country included in investigation because they contain essential components of finished merchandise and are not substantially transformed in third country); *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan,* 51 Fed. Reg. 28,396, 28,397 (Dep't Comm. 1986) (suspension of investigation and amendment of prelim. determ.) (same).

In this case, Smith Corona does not claim that transshipment, as defined by ITA, has taken place. Nor does it allege that the parts in question constitute "essential components" that originated in Japan and were not substantially transformed in a third country. The standards developed by ITA reasonably identify the country in which parts or components are "produced." As this is the determination that the statute requires, ITA's methodology was not contrary to law.

As for Smith Corona's argument that parts and components may be characterized as products of Japan based on design and engineering, no specific support is provided, and the argument runs contrary to the statute, which makes production, not the design and engineering aspects of production, the critical factor. *See* 19 U.S.C. § 1677j(a)(1)(B).[3] If ITA's decision as to where merchandise is produced were to be based on design and engineering, a first step in production, rather than on the final stage of production prior to exportation, the statute would be unworkable.

3. *Third country Parts and Operations in Japan Prior to Antidumping Order:*

In a further effort to bring third country parts under the rubric of Japan value, Smith Corona argued before ITA that third country parts, which were formerly incorporated into Japanese PETs, were included within the scope of the original antidumping order 56 Fed. Reg. at

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[2] Smith Corona argues rules of origin applied by the Customs Service are irrelevant and it does not attempt to demonstrate that Japan is the country of origin of the relevant parts in the Customs sense; that is, that the parts originated in Japan and were not substantially transformed in third countries. *See* 19 C.F.R. § 134.1(b) (1992). ITA apparently does use a substantial transformation test if the essential component of the item covered by the antidumping order is exported through a third country, but its view of what constitutes substantial transformation may differ from that of the Customs Service.

[3] Of course, subject merchandise that is completed or assembled in third countries may be included within the scope of an antidumping order, if the statutory criteria are met. This situation is not presented, however. 19 U.S.C. § 1677j(b) (1988).

58,034. Smith Corona then claimed that Brother simply transplanted the assembly line from Japan to the United States, so third country parts are still covered by the antidumping duty order. *Id.*

ITA rejected this argument because there was no evidence on the record as to the extent of operations in Japan prior to the antidumping duty order. 56 Fed. Reg. at 58,035. Smith Corona claims error.

Whether or not ITA'S reasoning was a proper basis for rejecting Smith Corona's argument, the claim would fail. The statute clearly describes the circumstances under which parts and components may be included within the scope of an antidumping duty order, if assembly is moved to the United States. 19 U.S.C. § 1677j(a)(1). It says nothing about abandoning those standards if the merchandise contained third country parts during the period when assembly took place in the subject country. Smith Corona's claim does not fall within the terms of the statute. Accordingly, ITA's determination is sustained.

(Slip Op. 93-12)

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Consolidated Court Nos. 87-01-00039 and 87-01-00122

MEMORANDUM OPINION AND ORDER

[Commerce Department determination remanded.]

(Decided January 28, 1993)

Willkie Farr & Gallagher (*William J. Clinton, James P. Durling, Lee M. Zeichner,* and *David E. Bond*) for defendant-intervenors AOC International, *et al.*

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson* and *J. Eric Nissley* of Counsel) for plaintiff Zenith Electronics Corporation.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael S. Kane,* attorney); (*Jeffery B. Denning,* Attorney Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel) for defendant.

WATSON, *Senior Judge:* This is the latest court decision in a series of actions involving color television receivers ("CTV's") from Taiwan. In it the court reviews a remand determination by Commerce filed on January 31, 1992. That remand determination contained the results of remands ordered by the court in *A.O.C. International v. United States,* 13 CIT 716, 721 F. Supp. 314 (1989) and *Zenith Electronic Corp. v. United States,* 15 CIT ____, 770 F.Supp. 68 (1991). Both of the remand orders were the result of judicial review of the final results of the first administrative review of the antidumping duty order on CTV's from Taiwan for the period from October, 1983 through March, 1985. *Color Television*

Receivers, Except for Video Monitors from Taiwan; Final Results of Antidumping Duty Administrative Review, 51 Fed. Reg. 46895 (December 29, 1986).

The court issued an order remanding the case to Commerce, *inter alia,* to determine what portion of a forgiven Taiwan commodity tax was passed through to home market purchasers and included in the home market price. *Zenith Electronics Corp. v. United States,* 770 F. Supp. 648, 651 (C.I.T. 1991). This was done so that a lawful determination could be made as to what extent the price in the home market of Taiwan might have been higher due to the "excusable" fact that it contained a tax which was not levied on the exported merchandise. See *Daewoo Electronics Co., Ltd. v. United States,* 15 CIT ____, 760 F.Supp. 200 (1991). See also, *American Alloys, Inc. et al. v. United States,* 17 CIT ____, (Slip. Op. 93-4, January 11, 1993).

Commerce sent questionnaires concerning tax pass-through to the four respondents in this review who had home market sales of CTV's, namely AOC, Proton, Sampo, and Tatung. For the sake of convenience they are referred to herein as the Taiwan interests. The two respondents who did not have home market sales were Shin-Shirasuna Electric Corp. ("Shirasuna," now known as Technol- Ace Corp.) and RCA Taiwan Ltd. ("RCA"). The responses to the questionnaire gave information concerning the Taiwan domestic market for the period 1981 through 1990. *See generally,* Respondents' Questionnaire Response, (Public Document No. 42); (The references to the record use the numbering system employed by Commerce in the index filed with the court on March 12, 1992). Respondents also submitted a report prepared by their economic consultant, National Economic Research Associates (NERA), which suggested a methodology for quantifying the portion of the Taiwan Commodity Tax passed through to consumers. (Pub. Doc. 43; Pro Doc. 17, Exhibit 1; "NERA Report.") Zenith submitted the comments of its own economic consultant, Professor Michael D. Bradley, (Pub. Doc. 61, Pro Doc. 19).

Commerce made two basic factual determinations. It concluded that the Taiwan companies all had constant costs, meaning that they could produce additional output for the same cost per unit as prior output. That determination is not in dispute. Commerce also concluded that the Taiwan color television industry was highly competitive, to such a degree that no individual company was capable of departing from the market price or capable of earning excess profits. Commerce then applied accepted economic reasoning to reach the ultimate conclusion that, in a market such as that found to exist in Taiwan, a tax would be fully passed through to the consumer and would not be absorbed to any extent by a producer. Commerce's conclusion about the nature of the economic forces governing the behavior of the entire industry obviated the need for specific econometric measurement of pass-through.

The degree of competitiveness of the Taiwan color television industry and its pricing behavior is the subject of intense dispute between the

parties to this action. Commerce stresses that its conclusion was based on (1) the large number of producers in the market, (2) the low market share of each producer, (3) the frequency with which producers entered the market, (4) the degree of concentration in the industry as measured by the Herfindal-Hirschman Index ("HHI"), and (S) the low return on assets and equity of the television industry compared to the average returns for the Taiwan electronics industry.

In its final results on the remand, Commerce concluded that the tax pass-through rate was 100%. Thereafter, the Taiwan interests filed a motion for entry of final judgment affirming the results of the remand. The government filed a response indicating that it had no objection to the entry of final judgment. Zenith then filed its opposition to the motion for final judgment, together with a cross-motion for a second remand.

On the question of tax pass-through the court was looking for substantial evidence that economic conditions in the industry were such that individual firms would have no discretion whatsoever in their pricing decisions. If that were the case, they would be compelled by ineluctable economic forces to fully pass on any taxes to the consumer. The court has not found substantial evidence in the record to support that conclusion. What the court has found is evidence regarding the structure and behavior of the industry which is insufficient to allow a reasonable person to conclude that the firms in the industry had no pricing discretion.

There is evidence that approximately 22 firms were involved in the Taiwan color television industry from 1981 to 1990 and the largest market share achieved by any one of them was less than 17%. There is also evidence that seven different firms had at least 10% of the Taiwan domestic market in at least one of those years and the firm with the largest market share was not the same throughout the period. *See* Technical Appendix I at 7–8, Technical Appendix II at 6–7; NERA Study at 24–26, 30–31.

The court is of the opinion that this evidence is far too abstract to support a conclusion that the firms in the industry had no power over their pricing decisions. At best, this evidence can suggest that the industry might be more competitive than one which is highly concentrated, but it is far from substantial evidence that competition was so powerful a force or so perfect in the economic sense that an individual firm in the industry had no price setting power. This sort of industry structure could just as easily be associated with a level of competition which allows firms to engage in price setting to a meaningful degree.

The same thing is true of the ITA reliance on the degree of concentration in the industry as measured by the Herfindal-Hirschman Index ("HHI"). This index is a tool used by the Department of Justice to measure the level of concentration in an industry when it is applying its merger guidelines. For the period involved in this case, the HHI figures for the Taiwan television industry were approximately one thousand, a number which Commerce considered to be additional evidence that the

industry was not concentrated and was competitive. The court finds the use of this index to be of no evidentiary value whatsoever. A value of one thousand is at the border of regions that the Department of Justice characterized as unconcentrated (below one thousand) and moderately concentrated (one thousand to one thousand eight hundred). Pub. Doc. No. 50, Exhibit I at S. 5. In fact, the court finds it noteworthy that the index measurement for the Taiwan television industry is not even close to the index measurement for industries which are more reasonably characterized as having highly competitive markets with relatively undifferentiated products, such as residential lighting fixtures with an index of 236, pumps and plumbing equipment with an index of 192, or speed changers, drives and gears with an index of 280. U.S. Department of Commerce, 1987 Census of Manufacturers: Concentration Ratios in Manufacturing (Feb. 1992, Table 4). In short, the HHI statistic is, in the court's view, totally lacking in evidentiary weight.

The government argues that Commerce did not use the HHI in the abstract but assessed it in the context of an additional factor; the ease of entry and exit to and from the Taiwan television industry. However, the court sees no special synergistic effect arising from the combination of the statistics on ease of entry into the market and the HHI. Of course it is true that low entry barriers in an industry may produce high levels of competition, but the conclusion that this must be the case in the Taiwan television industry is nothing less than supposition.

Commerce has also relied on calculations of profit rates for the four Taiwanese producers, finding these to be negative or zero for AOC and Proton and three to four percent for Sampo and Tatung. However, close examination of these figures by the court shows that they are not really a calculation of profits on color television sets. The figures were derived from the returns on assets or returns on equity for entire companies. It is clear that a company's return on assets or return on equity can differ dramatically from its profit ratio on its sales of televisions. In the opinion of the court, such evidence is insufficient to support a finding of low profits or nonexistant profits on sales of television sets and certainly inadequate to support the inference that such circumstances were an indication of competition so intense that industry members were forced to adhere to market prices in all cases.

Individually or in combination, the court does not view the aforementioned facts as evidence which a reasonable mind would consider adequate to support the conclusion that firms in the Taiwan television industry could not depart from certain ordained market prices for their products. For experts to draw such a conclusion, more substantial evidence would be essential.

This is a situation in which the existence of substantial evidence for a conclusion is particularly important because the conclusion is one which completely eliminates the need to find specific facts regarding individual producers. Moreover, the conclusion for which evidentiary support is sought is one which completely predetermines the conduct of all

the members of an industry. In these circumstances the court does not find these general factors concerning the industry to be such relevant evidence as a reasonable mind can accept as adequate to support a conclusion that the members of the industry were completely deprived of the power to vary their prices from the market price. This evidence falls short of the fundamental standard of review applied by the court in such cases. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elect. Indus., Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). Stated differently, the court does not find that this evidence permits the drawing of two inconsistent conclusions. If the evidence relied on by Commerce was ambiguous then there might be reason to defer to Commerce's view of the facts. *Labor Board v. Nevada Consolidated Copper Corp.,* 316 U.S. 105, 106. However, in the view of the court the affirmative evidence relied on by Commerce is wholly insubstantial.

The insubstantiality of the evidence which is cited in support of the conclusion reached by Commerce becomes even more pronounced when we turn to that evidence in the record which is more specifically related to the sale of color television receivers. Far from providing substantial evidence for the determination reached by Commerce, that additional and more persuasive evidence tends to provide support for a contrary conclusion.

In connection with the subject of ease of entry into the Taiwan television industry and its profitability, there is important evidence which contradicts the conclusion reached by Commerce that the Taiwan producers had no control over the prices. It is noteworthy that the closer the evidentiary materials come to the actual facts regarding production and sales of televisions in Taiwan, the more we find Commerce attempting to explain away the most likely inferences arising from that evidence. In 1986, midway through the period under scrutiny Taiwan removed its barriers to imports of color television receivers. In the two to three years following the removal of that barrier, sales of color television receivers in Taiwan doubled.

To begin with, in normal economic analysis, the existence of a barrier to the importation of foreign merchandise is considered to be a factor which prevents perfect competition from developing. *See* P.A. Samuelson and W. D. Nordhaus, *Economics* (13th ed. 1989) at page 573. Moreover, the dramatic doubling of television sales within a few years after the removal of import barriers would normally be considered a clear indication that the preexisting market had been undersupplied, a circumstance which is distinctly characteristic of imperfect competition in which producers have the power to set their prices.

Commerce's in-house economist tried to explain these dramatic sales increases as being attributable to increases in worker income and appreciation of the exchange rate. But the court finds it unreasonable to think that an increase of approximately 3% a year in the average rate of growth of workers' wages and unspecified exchange rate effects can account for the magnitude of the sales increase which occurred here. In

the opinion of the court, the only reasonable way to interpret the doubling of sales in so short a period is as a strong counterindication to the existence of perfect or near perfect competition in the television industry or, stated differently, a good indication of the sort of competition in which firms have a meaningful degree of power to set their prices. In the opinion of the court, the attempted explanation of the sales increase as due to increased income on the part of the workers and a beneficial exchange rate is entirely unreasonable and goes far beyond the discretion which an agency has to interpret conflicting evidence.

There is another segment of specific evidence in the record which was not treated in a reasonable way. Zenith's economic expert, Professor Bradley, made a presentation to Commerce which showed that in sales of the 19 to 20 inch television size within the "large-fancy" category, prices of the four manufacturers involved here differed greatly, by as much as 60 percent, and those prices often moved in opposite directions. This is a category of televisions which covers the largest quantity of the sales made by the firms involved. The direct and reasonable inference to be drawn from evidence such as this is that the market under observation is not demonstrating anything approaching perfect competition and the firms are demonstrating the distinct ability to set their own prices.

Commerce apparently thought that it was incongruous to compare these categories of television sets, but the incongruity is not apparent to the court. Such information appears to be far more focused and specific than the other evidence relied on by Commerce. Moreover, aside from a convoluted and insufficiently supported assertion that the product mixes involved in Professor Bradley's comparison were not properly comparable, the other explanations advanced by the government are rife with contradiction.

The government seems to take the position that even if these CTV products were deliberately differentiated by the producers, that would not preclude a finding that competitive forces prevented them from setting their own prices. However, this does not make economic common sense, as is pointed out by Zenith, because there is no reason for a manufacturer to spend resources on styling and advertising in order to differentiate its product if there is no potential benefit in the price that it can charge. In the sort of market envisaged by Commerce's determination, firms which have no power in setting the market price and can theoretically sell all they want at that compulsory market price, have no reason to waste resources on product differentiation. *See* R.C. Amacher and H.H. Ulbrich, *Principles of Economics,* 531 (1986). The large amount of brand name advertising shown in the record is inexplicable in the sort of market envisaged by Commerce.

This is similar to another contradictory argument made by the government. As was noted earlier, Commerce attempted to explain the dramatic increase in sales after the import ban was ended in 1986 as a result of increased purchasing power by consumers and a beneficial exchange

rate. The government argues that Zenith's claim (that the increased sales demonstrated a preexisting lack of competition) was based on an assumption that the marginal cost of the imported product was the same as the marginal cost of the Taiwan product. The government argues, however, that there is every reason to believe that the marginal costs of the imported products were lower and supports this proposition by pointing out that Commerce has found that Taiwan producers sold televisions in their home market below the cost of production just to maintain market share. The government cites *Color Television Receivers From Taiwan; Preliminary Results and Termination in Part of Antidumping Duty Administrative Review.* 56 Fed. Reg., 36, 765, 36, 766 (August 1, 1991); *Color Television Receivers From Taiwan; Preliminary Results and Termination in Part of Antidumping Duty Administrative Review,* 55 Fed. Reg. 53, 023, 53, 024 (December 26, 1990). It appears to the court, however, that the ability of the Taiwan producers to sell in their home market below the cost of production in order to maintain market share is a very good indication of their ability to set prices which differ from market prices and to endure the consequences of those price settings for a meaningful period of time. If Taiwan was a market in which firms were compelled to accept the market price and could sell as much as they wanted at that price, they obviously would be sacrificing profits needlessly by selling below the market price and their behavior would make no sense. The court can see no meaningful distinction between the ability to sustain losses in order to maintain market share and the ability to absorb all or part of a tax by accepting lower prices than the market price. This is another example of the contradictions which seem to be inherent in the government's attempt to find support for its position in this action. It is also a strong indication that the Taiwan firms have the power to vary their prices.

In short, it is the opinion of the court that it is unreasonable to view the evidence in this record as demonstrating the existence of an industry whose members cannot set a price which differs from the market price. Such general facts as there are in the record are insufficient and could just as easily describe an industry with imperfect competition in which firms can set prices. The more specific evidence in the record points to an industry in which price-setting is the case and Commerce's rejection of that more specific evidence is strained and unreasonable.

This holding by the court does not in any way mean that Commerce is barred from relying on established economic principles to make a general determination about an industry in a proper case. With the proper evidentiary basis it is possible that Commerce can eliminate the necessity for making specific measurements of certain facts with respect to individual firms. But a conclusion that an industry operates under economic conditions which are so constrained that an individual firm has no power to set its prices is a finding dependent on the existence of relatively extreme conditions. The evidence which demonstrates those conditions must be distinguishable from evidence which more likely

indicates an industry with imperfect competition in which firms have some power to set prices. If it is not, then the final determination is nothing more than an arbitrary choice or, as here, a choice which contradicts the evidence.

For these reasons the court concludes that substantial evidence is lacking for Commerce's determination in the latest remand that the competitive condition of the Taiwan CTV industry dictated a complete pass-through of tax. The question of pass-through must be remanded again to Commerce to be measured in a manner consistent with the constant costs, imperfect competition, and price-setting ability found in the Taiwan market and this must be done on the basis of the record as it has already been compiled.

Another issue continues to divide the parties in this case. When it remanded this case to Commerce, the court instructed Commerce to revise its constructed value ("CV") calculation so that adjustments for circumstances of sale would not reduce the general expenses components of CV below the statutory minimum amount of 10% of the cost of materials and fabrication. The court held that "adjustments based on sales expenses from transactions which were insufficient to establish a foreign market value may not reduce the statutory minimal component of general expenses." *Zenith Electronic Corp. v. United States,* 770 F. Supp. at 657.

There continues to be a dispute about how Commerce made adjustments to constructed value for differences in circumstances of sale under the authority granted in 19 U.S.C. § 1677b(a)(4). In its original determination, Commerce made adjustments for circumstances of sale in the home market which lowered the general expenses below the statutory minimum of 10% set out in 19 U.S.C. § 1677b(e)(1)(B)(i). In its earlier opinion in this case, the court disapproved the adjustments which lowered the general expenses below the 10% statutory amount and reasoned as follows:

> Logical consistency should dictate that if sales in the home market are so insignificant that they lead Commerce to reject them as a source of foreign market value and choose constructed value instead the actual selling expenses associated with those insignificant home market sales should also not be relied upon for any related purpose. Given the authority to adjust constructed value for circumstances of sale, the court sees only one way to reconcile it with a statutory minimum for general expenses and a statutory bar on the use of insignificant sales as a source of foreign market value. (19 U.S.C. § 1677b(a)(1)(B)). That way is to maintain the 10% as an amount which cannot be lowered by adjustments derived from sales which are too insignificant to support a foreign market value.

Zenith Electronics Corp. v. United States, 770 F. Supp., at page 657.

The court instructed Commerce to make the appropriate changes to the constructed value calculations on remand. Now the parties disagree on whether Commerce fully implemented the ruling of the court. On the one hand, Commerce and the Taiwan interests argue that Commerce

satisfied the terms of the remand because, when all was said and done, the adjustment to foreign market value for differences in circumstances of sale left the general expense component of constructed value *above* the statutory minimum of 10% of cost of manufacture. Zenith, however, points out that Commerce reached its final figure after first allowing the selling expenses from the insignificant home market sales to reduce the general expenses *below* the statutory minimum and it was only the upward adjustments needed to account for expenses from *US sales* which brought general expenses back to at least its statutory minimum.

In the opinion of the court, the procedure used by Commerce in the remand has the same legal defects as the direct use of home market selling expenses to reduce constructed value general expenses to a final amount less than the statutory minimum. This is clearly illustrated in an example used by Zenith which can be stated as follows: For purposes of this example, we will assume that constructed value general expenses are $12 and that the statutory minimum amount for general expenses is $10, being 10% of a cost of manufacture of $100. If, in that hypothetical case, the selling expenses from disregarded home market sales were $4, Commerce would not be allowed to subtract the full $4 of home market selling expenses from the actual general expense figure of $12 so as to bring the general expense figure to $8, a sum which is below the statutory minimal amount of $10. Now we add an additional fact into the hypothetical, the existence of $2 of selling expenses from the comparison US sale, an amount which must be *added* to constructed value as an upward adjustment for circumstances of sale. If the court approved the procedure used by Commerce in this remand, then in this hypothetical example, the $4 of home market expenses could first be fully used to lower the $12 of actual general expenses down to $8; that $8 figure could be raised by the $2 of US expenses back to $10, and we could say that we had a figure of $10 for general expenses—an amount equal to the statutory minimum. However, this example should make it apparent that the final figure was arrived at only by using a step in which home market selling expenses had reduced the general expenses to less than the statutory minimum. The important statutory considerations which the court analyzed in its prior opinion are not avoided just because adjustments from selling expenses in the US ultimately raise the figure for general expenses. The crux of the matter is that the sales which must be disregarded for the purpose of determining foreign market value under 19 U.S.C. 1677b(a)(1)(B) should not undermine the specific statutory provision designed as a replacement for those disregarded sales.

It is of no legal importance that the manner in which the final circumstances of sale adjustment is made is by means of single mathematical adjustment. This does not give Commerce the authority to accomplish a forbidden result by earlier additions or subtractions. Accordingly, Commerce will now be required to insure that constructed value general expenses are not reduced to less than the statutory minimal amount by home market selling expenses *before* US selling expenses are added

back. In terms of the example earlier given, this would mean that the $4 of expenses from home market sales could reduce general expenses only to the statutory minimum of $10, after which the $2 of US expenses would require a circumstance of sale adjustment raising the amount to $12.

There are four matters on which the government agrees that Commerce erred. Stated briefly, these were (1) the failure to cap the amount of forgiven tax which may be added to United States price; (2) a miscalculation of the so-called "second-level" adjustment for the tax consequences of differences in circumstances of sale; (3) the deduction of AOC's home market advertising expenses from foreign market value twice in making exporters sales price comparisons and; (4) leaving AOC's labor expense as zero for the constructed value calculation in exporters sales price comparison.

As to the first matter, this court has repeatedly held that the adjustment for taxes required by 19 U.S.C. § 1677a(d)(1)(C) requires Commerce to calculate the adjustment for forgiven taxes as an addition to USP and to do so in a way which "caps" the amount at the lesser of the amount of tax actually passed through to the consumer in the home market, or the amount which would have been assessed on the exported merchandise.

This court has consistently held that in calculating the adjustment for forgiven taxes (which must be made by means of an addition to United States price) that addition must be capped so that it is not greater than the amount of tax that was actually passed through to home market purchasers. Commerce concedes that it did not "cap" the amount of forgiven tax added to USP and agrees that a remand is appropriate in the present case in order to impose such a "cap."

On the second matter, Commerce agrees that it erred in making circumstances of sales adjustments which had been limited by the court to "those circumstances of sale which do not flow from the originally determined dumping price * * *." *Zenith Electronics Corp. v. U.S.*, 770 F. Supp. at 651. In the course of making these adjustments, Commerce apparently did not account for the tax consequences of duties in export value but only accounted for them in home market taxable value. This led to an understatement of fair market value and consequent understatement of the dumping margins. Stated differently, this means that Commerce removed the tax consequences of import duty from foreign market value but left the tax consequences of import duty in USP. To correct this error, Commerce must include the import duty which is in the export tax basis as part of the differences in circumstances of sale against which the tax rate is applied when quantifying the total effect of differences in circumstances of sale on the calculation of the amount of tax to be added to USP.

The final two matters are two clerical errors which require correction. AOC's home market advertising expenses were deducted from foreign market value twice in the course of making comparisons with exporters'

sale price. In addition, AOC's labor expenses, which were set at zero in preparation for redefining their value, were left at zero for the constructed value labor expense. These were plainly inadvertent clerical errors and fairness dictates that they should be corrected on remand.

For the reasons given above, the motion for final judgment is Denied and it is hereby ORDERED that the case is remanded to Commerce and Commerce is given 90 days for the following purposes:

1. To determine home market tax pass-through in a manner consistent with the constant costs and imperfect competition characteristic of the Taiwanese color television market and on the basis of the existing record.
2. To cap the upward adjustment to USP for forgiven tax at the amount of tax found to be passed through to home market purchasers.
3. To make the second level adjustment for the difference in circumstances of sale adjustments included in the export and home market taxable values.
4. To insure that the general expenses component of constructed value is not reduced at any time to less than the statutory minimum amount by reason of adjustments for selling expenses associated with the disregarded home market sales.
5. To correct the double deduction of AOC's home market advertising expenses.
6. To correct the specification of constructed value labor expenses as having a value of zero.

(Slip Op. 93–13)

SEA-LAND SERVICE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–01–00019

Defendant moves pursuant to Rule 12(b)(1) of the Rules of this Court to dismiss this action for lack of jurisdiction, claiming that plaintiff's protest of Customs' liquidation was untimely filed under 19 U.S.C. § 1514(c)(2) (1988 & 1992 Supp.). Plaintiff opposes defendant's motion and cross-moves pursuant to Rule 56 of the Rules of this Court for summary judgment.

Held: Defendants motion to dismiss for lack of jurisdiction is denied since (1) plaintiff acted reasonably in relying on defendant's erroneous letter stating that the entry will be liquidated when in fact it was liquidated five days earlier; (2) defendant failed to suspend liquidation pursuant to 19 C.F.R. § 4.14(d)(vi) (1992) until thirty days after its denial of plaintiff's application for relief; and (3) plaintiff brought its request for reliquidation to the attention of the appropriate customs officer well within the one year time limit as set forth by 19 U.S.C. § 1520(c)(1) (1988 & 1992 Supp.). Furthermore, plaintiff's cross-motion for summary judgment is granted since Customs concedes that a clerical error was made at liquidation, and Customs is ordered to reliquidate vessel repair entry No. C–32–0006746–1 with a refund of $262,556.50 plus interest to Sea-Land.

[Defendant's motion to dismiss is denied; plaintiff's cross-motion for summary judgment is granted.]

(Dated January 28, 1993)

Ross & Hardies (*Myles J. Ambrose, Evelyn M. Suarez* and *David F. Norton*); of counsel: *Robert S. Zuckerman*, Sea-Land Service, Inc., for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Barbara M. Epstein*); of counsel: *Mark G. Nackman*, International Trade Litigation, U.S. Customs Service, for defendant.

Opinion

TSOUCALAS, *Judge:* Defendant moves pursuant to Rule 12(b)(1) of the Rules of this Court to dismiss this action for lack of jurisdiction.[1]

This action was initiated by plaintiff, Sea-Land Service, Inc. ("Sea-Land"), to recover duties assessed on repairs made overseas to its American documented vessel pursuant to 19 U.S.C. § 1466(a).[2] Subsequent to the assessment of duties, Sea-Land challenged the assessment by filing an application for relief with Customs' San Francisco Vessel Repair Liquidation Unit, seeking remission based on a claim that the work constituted non-dutiable modifications under 19 U.S.C. § 1466(a). Plaintiff's Exhibits B & C. On May 1, 1990, Customs determined that Sea-Land's application for relief was defective on procedural and substantive grounds. Therefore, on May 25, 1990, Customs liquidated the entry. *See* Bulletin Notice of Liquidation. On May 30, 1990, Customs notified Sea-Land by letter that its application for relief was denied and that it had ninety days from the date of liquidation to file a protest to this decision. On August 28, 1990, Sea-Land filed a protest to the liquidation. On July 15, 1991, Customs denied Sea-Land's protest as untimely filed. Plaintiff's Exhibit G.

The Government now brings this motion to dismiss claiming that the protest was not timely filed. Sea-Land opposes defendant's motion and cross-moves for summary judgment pursuant to Rule 56 of the Rules of this Court seeking an order holding that its protest was timely filed and directing Customs to reliquidate vessel repair entry No. C–32–006746–1 with a refund of $262,556.50 plus interest. Sea-Land claims that in its liquidation Customs erroneously construed a charge for paint as being in U.S. dollars when in fact it was stated in Japanese yen. This charge is reflected in Item 39 of the Application for Relief. As a result, Sea-Land was assessed excess duties in the amount of $262,556.50.

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[1] Rule 12(b)(1) empowers a party to bring a motion for "lack of jurisdiction over the subject matter." USCIT R. 12(b)(1)(1988).

[2] 19 U.S.C. § 1466(a) (1988) states:

> (a) The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States * * * shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

DISCUSSION

According to 19 U.S.C. § 1514(C)(2) (1988 & 1992 Supp.), a protest of a Customs decision "shall be filed * * * within ninety days after but not before—(A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made."

In this case, Sea-Land claims that its protest was timely filed eighty-nine days after the ninety-day period began to run. Sea-Land claims that the ninety days began to run on May 30, 1990, the date they received a letter from Michael Weissman, Chief, Technical Branch, Commercial Operations Division, in which Customs notified Sea-Land that its application for relief had been denied. *Defendant's Motion to Dismiss and Memorandum in Support of its Motion* (*"Defendant's Motion"*), Exhibit B. The Government, however, claims that the ninety day statutory period began to run on May 25, 1990, the date of liquidation, and that Sea-Land's protest was untimely filed ninety-four days thereafter. Thus, the issue before this Court is from when did the ninety day period begin to run during which Sea-Land was to protest Customs' decision.

The statute clearly states that a protest of a Customs decision must be filed within ninety days after notice of liquidation. *See* 19 U.S.C. § 1514(c)(2). This Court has stated that "proper notice of liquidation refers to the bulletin notice of liquidation." *See Penrod Drilling Co. v. United States,* 13 CIT 1005, 1009, 727 F. Supp. 1463, 1467 (1989), *aff'd,* 925 F.2d 406 (1991); *see also, Goldhofer Fahrzeugwerk GmbH v. United States,* 13 CIT 54, 706 F. Supp. 892, *aff'd* 885 F.2d 858 (Fed. Cir. 1989). Furthermore, "the date of liquidation shall be the date the bulletin notice is posted in the customhouse." *United States v. Reliable Chem. Co.,* 605 F.2d 1179, 1183 (1979); *Penrod Drilling,* 13 CIT at 1009, 727 F. Supp. at 1467; *Goldhofer,* 13 CIT at 58, 706 F. Supp. at 895. It is the importer who "has the burden for examining all notices posted to determine whether its goods have been liquidated, and to protest timely." *Penrod Drilling,* 13 CIT at 1009, 727 F. Supp. at 1467; *Goldhofer,* 13 CIT at 58, 706 F. Supp. at 895; *Omni U.S.A., Inc. v. United States,* 11 CIT 480, 483, 663 F. Supp. 1130, 1133 (1987), *aff'd,* 840 F.2d 912 (Fed. Cir. 1988), *cert. denied,* 488 U.S. 817 (1988). The bulletin notice in this action clearly states that the date of liquidation was May 25, 1990.

Plaintiff, however, claims that in calculating the ninety day period it relied on a misleading letter sent to them on May 30, 1990. The ambiguous letter stated that the entry in question *will be liquidated,* when in fact it *was* liquidated five days earlier.[3] Based on this alone, it was very possible for Sea-Land to be unsure as to the date of liquidation and, thus, Sea-Land acted reasonably in relying on Customs letter of May 30, 1990. The letter indicated that the entry had not been liquidated as of yet and

[3] The letter stated that "[within 90 days after the date of liquidation," Sea-Land may file a protest. *Defendant's Motion,* Exhibit B. The letter further stated that "your application for relief from duties is denied in full, and the above referenced vessel repair entry *will be liquidated* with a bill for the amount of $1,214,120.50." *Id.* (emphasis supplied).

Sea-Land was reasonable in assuming that the ninety days to protest would at least not begin to run until May 30.

Plaintiff relies on the court's holding in *Farrell Lines, Inc. v. United States,* 657 F.2d 1214 (CCPA 1981), *modified,* 667 F.2d 1017 (1982), and claims that under the ruling of this case, the limitations period of ninety days should be tolled from May 25, 1990, the date of liquidation, until May 30, 1990, the date Sea-Land received the letter from Customs because it was the final agency action.

In *Farrell Lines,* plaintiff filed a supplemental petition, and it was held that the ninety-day period of limitations for filing a protest of liquidation was tolled from the date the shipbuilder filed the supplemental petition until notice was given of the petition's denial. Moreover, the plaintiff in *Farrell Lines* was expressly advised by Customs that it had ninety days after the denial of the supplemental petition to file a formal protest. *See Farrell Lines,* 657 F.2d at 1216. Relying on this advice, plaintiff in *Farrell Lines* did attempt to protest within ninety days of the denial. Defendant moved to dismiss the protest as untimely, but the court denied its motion. At no time was plaintiff advised that its protest, though filed more than ninety days after liquidation, was not a valid protest. *Id.* at 1216–17.

In the case at hand, plaintiff was likewise misled by defendant's letter which indicated to them that liquidation had not occurred as of May 30, 1990. Thus, although they did not check the bulletin notice of liquidation, they did act reasonably in figuring that the ninety days would at least not commence to run until May 30.

While the Supreme Court has stated in *Irwin v. Veterans Administration,* 498 U.S. ____, 111 S.Ct. 453 (1990), that Federal Courts "have typically extended equitable relief only sparingly," the Court further stated that it has

> allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period [footnote omitted], or where the complainant *has been induced* or tricked by his adversary's misconduct into allowing the filing deadline to pass [footnote omitted].

Id. at ____, 111 S.Ct. at 457–58 (emphasis supplied).

In this case, Customs' erroneous letter induced Sea-Land to allow the filing deadline to pass. This Court in good conscience cannot allow plaintiff to be deprived of its rights due to the sloppiness of Customs. While this Court is confident that Customs' error was unintentional, it was nevertheless misleading to plaintiff. Accordingly, the statutory ninety-day period is tolled from May 25 until May 30, 1990 and defendant's motion to dismiss for lack of jurisdiction is denied.

Premature Liquidation:

Sea-Land alternatively alleges in its brief that Customs prematurely liquidated the entry at issue thereby causing additional confusion over the liquidation date. *Plaintiff's Opposition to Defendant's Motion to Dismiss and Plaintiff's Cross-Motion for Summary Judgment* at 5–6. Regulation 19 C.F.R. § 4.14(d)(vi) (1992)[4] directs that liquidation of an entry should be suspended until thirty days after Customs notifies a party that its "application for relief" from duties has been approved or denied. In this case, Sea-Land received notice that its application for relief was denied on May 30, 1990. The entry, however, was liquidated on May 25, 1990, and thus, Customs did not comply with section 4.14(d)(vi). Sea-Land argues that if the liquidation was suspended pursuant to section 4.14(d)(vi), then liquidation would have occurred no earlier than May 30 and, subsequently, Sea-Land's protest would have been timely filed.

Customs, however, claims that the liquidation was not suspended for thirty days because Sea-Land's letter was missing the necessary elements to constitute an application for relief. *See* 19 C.F.R. § 4.14(d)(1). Customs reasoned that the letter was too substantively and procedurally defective to be considered a complete and valid "application for relief" within the meaning of section 4.14(d)(1), and denied the application without extending liquidation until thirty days after notification.

According to the regulations, an application for relief "need not be in any particular form." 19 C.F.R. § 4.14(d)(1)(i). However, it should allege certain things including:

> that an item or a repair expense covered by the entry is not subject to duty * * *. The application for relief also shall certify that all foreign equipment, parts, or materials purchased for, and all foreign repairs made to, the vessel within one year immediately preceding the application have been declared as required by this section, or the application shall be deemed incomplete.

Id.

Furthermore, each application for relief shall include duplicate copies of "[a]ll itemized bills, receipts, and invoices covering items specified" as well as other supporting and documentary evidence, unless such evidence is already filed with Customs. *See* 19 C.F.R. § 4.14(d)(iii) and (iv) (1992).

Customs claims that Sea-Land's application for relief lacked some of these key elements, and therefore Customs deemed Sea-Land's application for relief flawed and incomplete. Furthermore, Customs deemed the entry subject to immediate liquidation upon the expiration of the allotted time period (i.e., within sixty days from the date of first arrival of

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[4] 19 C.F.R. § 4.14(d)(vi) states that "[i]f an application for relief has been filed within the time period provided in paragraph (d)(1)(ii) of this section, liquidation of the vessel repair entry shall be suspended until 30 days after the date of the written notice provided for in paragraph (d)(1)(v) of this section."

the vessel or before the expiration of any extension of time granted)." *Defendant's Motion,* Exhibit A.

Sea-Land argues that it was deprived of its rights under section 4.14. It claims that section 4.14 was designed to allow the vessel operation to administratively appeal Customs' initial decision and to provide any further information shedding light on its entry prior to liquidation. *Plaintiff's Reply to Defendant's Opposition to Plaintiff's Cross-Motion for Summary Judgment* at 6.

Nevertheless, Customs argues that the vessel repair regulation 4.14 is directory and not mandatory within the purview of *Canadian Fur Trappers Corp. v. United States,* 12 CIT 612, 691 F. Supp. 364 (1988), *aff'd,* 884 F.2d 563 (1989). *Canadian Fur Trappers,* however, is inapposite to the case at hand. In *Canadian Fur Trappers,* plaintiffs claimed that, under 19 U.S.C. § 1504, when an extension is lifted after four years, then Customs has ninety days in which they "shall" liquidate, or the entries will be deemed liquidated. *Id.* The court ruled that this provision, however, is discretionary and not mandatory because "there will be instances when it may be impossible to complete liquidation within 90 days because of the sheer number of entries to be liquidated after a long continued suspension." *Id.* at 616, 691 F. Supp. at 368 (quoting H.R. Rep. No. 95–621, 95th Cong., 1st Sess. 26 (1977)).

Thus, in *Canadian Fur Trappers,* the issue was that Customs might need longer than the ninety day period in which to liquidate. In the case at hand, Customs prematurely liquidated the entry in question when they were required to wait until the thirty days expired to liquidate. Thus, the reasoning of *Canadian Fur Trappers* does not follow here and Customs should have suspended liquidation for thirty days.

Section 1520:

Although plaintiff's protest is considered timely by this Court under the circumstances, plaintiff's protest to Customs' liquidation could alternatively be considered a timely application under 19 U.S.C. § 1520 (1988 & Supp. 1992). In this case, although plaintiff filed its protest pursuant to section 1514, the more appropriate remedy was to seek reliquidation of the entry due to a clerical error pursuant to section 1520(c)(1). Section 1514 sets forth "the proper procedure for an importer to protest the classification of its merchandise when it believes that Customs has misinterpreted the applicable law and has illegally classified the imported merchandise." *Computime, Inc. v. United States,* 9 CIT 553, 555, 622 F. Supp. 1083, 1084 (1985). By comparison, 19 U.S.C. § 1520(c)(1) "is designed to permit Customs to correct mistakes of fact or inadvertence which have caused an error in liquidation." *Id.* Section 1520(c) provides that:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may * * * reliquidate an entry to correct—
>
> (1) *a clerical error,* mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by

> documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer *within one year* after the date of liquidation or exaction.

19 U.S.C. § 1520(c)(1)(1988 & 1992 Supp.)(emphasis supplied).

In a similar case, *George Weintraub & Sons, Inc. v. United States,* 12 CIT 643, 691 F. Supp. 1449 (1988), the court denied the government's motion to dismiss and granted plaintiff's motion for summary judgment. In *George Weintraub,* plaintiff likewise sought reliquidation of the entry in question, and filed its protest ninety-one days after liquidation. Over a year later, Customs denied plaintiff's protest as untimely filed. At that time, the one-year statutory limit of section 1520(c)(1) had expired. The court, however, deemed that protest to be a request for reliquidation and therefore found that it was timely filed within one year of liquidation pursuant to section 1520(c)(1).

In that case, the court deemed the error as a "mistake of fact or other inadvertence" within the context of section 1520(c)(1). The court explicitly stated that, under section 1520(c)(1), "a mistake may be corrected if a request for reliquidation is made within one year from the date of liquidation even though a protest was not timely filed." *Id.* at 647, 691 F. Supp. at 1451. The court further stated that it was "disingenuous" for Customs to wait fifteen months to respond to plaintiff's request for reliquidation, and furthermore, to claim that plaintiff's protest was untimely, when Customs themselves took an inordinate amount of time to deny its protest, is "manifestly unfair to plaintiff." *Id.* The court stated:

> While one could wish that plaintiff had been more artful in filing its request for reliquidation and its two subsequent protests, and one could further wish that some of these had been done in a more prompt fashion, defendant's conduct in taking fifteen months to deny the request for reliquidation * * * itself created a situation * * * in which it does not lie well in the defendant's mouth to say that plaintiff should be denied his request for reliquidation, or his day in court, due to "untimeliness."

Id. at 648, 691 F. Supp. at 1453.

Likewise in this case, plaintiff is protesting a clerical error in the liquidation which is specifically covered by section 1520(c)(1). Thus, even if Sea-Land's protest was deemed to be filed after ninety days, which it is not, their protest was filed within the one-year deadline specified by section 1520(c)(1). Section 1520(c)(1) states that the request for reliquidation must be brought to the attention of the appropriate customs official within one year. In this case, Sea-Land's protest of August 28, 1990 serves as adequate notice to the appropriate customs official. Also, since Customs waited nearly a year after Sea-Land's protest and fourteen months after liquidation to deny plaintiff's protest as untimely, it is in no position to complain about untimeliness because by the time it denied plaintiff's protest, it was too late for plaintiff to bring an independent action under section 1520(c)(1).

Plaintiff's Cross-Motion for Summary Judgment:

Thus, having denied defendant's motion to dismiss, this Court is now empowered to entertain Sea-Land's cross-motion for summary judgment. Sea-Land cross-moves for summary judgment pursuant to Rule 56 of the Rules of this Court seeking an order holding that its protest was timely filed and directing Customs to reliquidate vessel repair entry No. C–32–0006746–1 with a refund of $262,556.50 plus interest. Sea-Land claims that in its liquidation Customs erroneously construed a charge for paint as being in U.S. dollars when in fact it was stated in Japanese yen. This charge is reflected in Item 39 of the Application for Relief. As a result, Sea-Land was assessed excess duties in the amount of $262,556.50.

Customs concurs with Sea-Land and concedes this error. *See Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is no Genuine Issue to Be Tried,* Para. 15. To withhold this undisputed amount of money from Sea-Land under these circumstances would be a miscarriage of justice. Incumbent in the responsibilities of Customs is an obligation of good faith. In this case, it is apparent that Customs did not honor this obligation and therefore Sea-Land's cross-motion for summary judgment is granted and Customs is ordered to reliquidate vessel repair entry No. C–32–0006746–1 with a refund of $262,556. 50 plus interest.

Conclusion

In accordance with the foregoing opinion, defendant's motion to dismiss is denied since (1) plaintiff acted reasonably in relying on defendant's erroneous letter of May 30, 1990, stating that the entry will be liquidated when in fact it was liquidated five days earlier; (2) defendant failed to suspend liquidation pursuant to its own regulations until thirty days after its denial of plaintiff's application for relief; and (3) plaintiff brought its request for reliquidation to the attention of the appropriate customs officer well within the one year time limit as set forth by 19 U.S.C. § 1520(c)(1). Furthermore, plaintiff's cross-motion for summary judgment is granted as both plaintiff and defendant concur that a clerical error was made in construing a charge for paint as being in U.S. dollars when in fact it was stated in Japanese yen. Therefore, Customs is ordered to reliquidate vessel repair entry No. C–32–0006746–1 with a refund to Sea-Land of $262,556.50 plus interest.

(Slip Op. 93–14)

GENERAL MOTORS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–03–00471

(Dated January 29, 1993)

JUDGMENT

TSOUCALAS, *Judge:* In accordance with the decision (October 8, 1992) and mandate (January 4, 1993) of the United States Court of Appeals for the Federal Circuit, Appeal No. 91–1518,

IT IS HEREBY ORDERED that judgment be, and hereby is, entered for defendant, and the merchandise which is the subject of this action is not within the scope of item 807.00, TSUS; and it is further

ORDERED that this case is hereby dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/11 1/22/93 DiCarlo, J.	Mattel, Inc.	87–03–00466	737.95 10.9% 9.6%	912.20 Free of duty	Mattel, Inc. *v.* The United States, 926 F.2d 1116 (1991)	Los Angeles Various articles not over five cents per unit
C93/12 1/27/93 Newman, J.	Merck & Co.	88–08–00626–S	437.49 5%	437.76 Free of duty	Agreed statement of facts	JFK Micro-organism cultures

Index

Customs Bulletin and Decisions
Vol. 27, No. 7, February 17, 1993

U.S. Customs Service

Treasury Decisions

General Notice

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1993–343–018–60029